UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:18CR923 HEA
	)	
MARTIN ALBERTO GUERRA,	)	
	)	
Defendant.	)	

OPINION, MEMORANDUM AND ORDER

This matter is before the Court on the Report Recommendation of Judge Patricia L. Cohen, addressing Defendant Guerra's Motion to Suppress [Doc. No. 81] and his Motion for Severance, [Doc. No. 77]. On July 23, 2019, an evidentiary hearing was held. In her August 28, 2019 Report and Recommendation, Judge Cohen recommended that the Defendant's motions be denied. Defendant has filed a written objection to this recommendation. For the reasons set forth below, the Court adopts Judge Cohen's recommendation.

LEGAL STANDARD

When a party objects to the magistrate judge's report and recommendation, the Court must conduct a *de novo* review of the portions of the report, findings, or recommendations to which the party objected. See *United States v. Lothridge*, 324 F.3d 599, 600 (8th Cir. 2003) (citing 28 U.S.C. § 636(b)(1)(A)). Where it has been

shown that the magistrate judge's order is clearly erroneous or contrary to law, the Court may reconsider the matter. 28 U.S.C. §636(b)(1)(A). Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court reviews the findings of the magistrate *de novo.* The Court has reviewed the entire record for this purpose.

DISCUSSION

Motion to Suppress

In her Report and Recommendation, Judge Cohen found that the evidence obtained from a precision location warrant should not be suppressed because the search warrant was supported by probable cause. Defendant objects to this finding.

Defendant argues that the issuing judge did not have a substantial basis for concluding that probable cause existed for the issuance of a warrant. Defendant argues that the affidavit of Agent Adam Peel, a task officer assigned to United States Homeland Security Investigations in St. Louis, upon which the issuing judge relied, lacks detail. Defendant argues that the affidavit contains innocent activity that is not specific on the substance of any criminal activity.

Judge Cohen set out the applicable Eighth Circuit law regarding the probable cause requirement for the issuance of a search warrant; in particular, she noted that:

> To be valid, search warrants must be based upon a finding by a neutral and detached judicial officer that there is probable cause to believe that evidence, instrumentalities or fruits of a crime, contraband, or a person for whose

> arrest there is probable cause, may be found in the place to be searched. *See, e.g, Warden v. Hayden*, 387 U.S. 294, 301-09 (1967); *Johnson v. United States*, 333 U.S. 10, 13-15 (1948); Fed. R. Crim. P. 41. The quantum of evidence needed to meet this probable cause standard has been addressed by the Supreme Court on numerous occasions. "In dealing with probable cause… as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949). Probable cause is "a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). Search warrant applications and affidavits should be read with common sense and not in a "grudging," "hypertechnical" fashion. *See United States v. Ventresca*, 380 U.S. 102, 108-09 (1965).
>
> It is well-established that, when the issuing judge relies upon the supporting affidavit to issue a search warrant, "only that information which is found within the four corners of the affidavit may be considered in determining the existence of probable cause." *United States v. Solomon*, 432 F.3d 824, 827 (8th Cir. 2005) (internal quotation marks and citations omitted); *see also United States v. Gladney*, 48 F.3d 309, 312 (8th Cir. 1995) (internal quotation marks and citation omitted). Probable cause may be found in observations made by trained law enforcement officers. *Ornelas v. United States*, 517 U.S. 690, 700 (1996) ("… our cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists."). Information contained in applications and affidavits for search warrants must be examined for probable cause by reviewing the totality of the circumstances presented. *Gates*, 462 U.S. at 230-31. Once a judicial officer has issued a search warrant upon a finding of probable cause, that finding deserves great deference. *Id*. at 236; see also *United States v. Macklin*, 902 F.2d 1320, 1324 (8th Cir. 1990) ("… this court does not conduct a *de novo* review of the issuing judge's determination, but must instead afford it great deference").

Judge Cohen aptly concluded that the issuing judge had a substantial basis for the finding of probable cause. Agent Peel's affidavit includes, *inter alia*, the following :

Agent Peel works with the Gateway Smuggling Task Force. On October 5, 2018, agents from the task force received information from a confidential informant, ("CI"), regarding a Kansas City narcotics distributer who supplied the CI with more than five pounds of methamphetamine in the past. The CI was asked to make telephone contact with the distributor to try to arrange a delivery of narcotics. The CI agreed and the telephone conversation between the CI and the contact was monitored by the agents. A delivery of methamphetamine was arranged. The following day, the agents observed a man arrive at the pre-arranged meeting place. The investigators observed the man hand a bag to the CI. He then left the area. The bag, which was retrieved from the CI contained a kilogram of methamphetamine and a pound of marijuana. The CI confirmed that the man was Defendant Guerra, with whom the CI was familiar from past narcotics transactions.

Defendant Guerra began calling the CI on October 7, 2018 regarding payment for the drugs. The telephone number from which Defendant called was different than the number the CI called; it was the telephone number for which the precision location information order was sought.

The facts in the affidavit reasonably provided Judge Cohen with a substantial basis to conclude that probable cause existed to issue the warrant. Defendant's argument as to the affidavit lacked any specificity relative to illegal activity is unpersuasive. The CI reported that the CI had previously purchased

methamphetamine from Defendant. The CI and Defendant arranged a transaction and narcotics were seized from that transaction that was carried out in accordance with the telephone conversation between the CI and Defendant that was monitored by the agents. The CI provided information that was realized in the meeting of Defendant and the delivery of the narcotics. Judge Cohen's conclusion that the warrant was supported by probable cause is based on sound legal analysis. The Court agrees with her conclusions in their entirety.

Motion to Sever

Rule 14 provides in relevant part:

> If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

Fed. R. Civ. P. 14(a).

Defendant argues that he can demonstrate a real prejudice that denies him the right to a fair trial. Defendant's objections to the Report and Recommendation, however, must be overruled.

The Government has advised the Court that it does not anticipate any *Bruton* issues at trial. Moreover, Defendant has not identified any incriminating statements of a non-testifying co-defendant that might be introduced at trial The objection based on *Bruton v. United States*, 391 U.S. 123 (1968) is therefore

overruled, without prejudice to refiling in the event Defendant can identify any incriminating statements.

With respect to Defendant's claim that jurors might be confused by the disparity in the amount of evidence introduced against him and his co-defendants, Judge Cohen correctly discussed the applicable law regarding confusion. Mere disparity of evidence against co-defendants or the alleged prejudicial spillover effect of evidence are not grounds for severance absent a showing of the inability to compartmentalize the evidence against each defendant. *United States v. Kime*, 99 F.3d 870, 880 (8th Cir. 1996); *United States v. Ali*, 799 F.3d 1008, 1023 (8th Cir. 2015).

> When defendants are properly joined, "there is a strong presumption for their joint trial, as it 'gives the jury the best perspective on all of the evidence and therefore increases the likelihood of a correct outcome.'" *Id.* at 1039 (quoting *United States v. Darden*, 70 F.3d 1507, 1528 (8th Cir.1995)). This presumption can only be overcome if the prejudice is "severe or compelling." *United States v. Crumley*, 528 F.3d 1053, 1063 (8th Cir.2008). "To demonstrate the severe or compelling prejudice necessary to show that the court abused its discretion in denying severance, 'a defendant must show that his defense was irreconcilable with that of the codefendant or that the jury was unable to compartmentalize the evidence.'" *United States v. Basile*, 109 F.3d 1304, 1310 (8th Cir.1997) (quoting *United States v. Bordeaux*, 84 F.3d 1544, 1547 (8th Cir.1996)).

United States v. Lewis, 557 F.3d 601, 609 (8th Cir. 2009).

Defendant has made no showing of an inability to compartmentalize evidence in light of the record before the Court.

Finally, Defendant argues that there is a high likelihood of antagonistic defenses among his co-defendants and himself. As stated above, Defendant must demonstrate that his defense is irreconcilable with that of his co-defendants. Based on the record before the Court, Defendant has not shown how he can satisfy this standard. Defendant's objection is overruled.

Judge Cohen thoroughly discusses the applicable law as applied to this case. The Recommendation is adopted *in toto*.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion to Suppress, [Doc. No. 81, is **DENIED**.

IT IS FURTHER ORDERED that Defendant's Motion for Severance, [Doc. No. 77], is **DENIED**.

Dated this 2nd day of October, 2019.

HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE